the Second Circuit, entered in the above-entitled case on August 1, 1962 (Appendix A hereto, *infra*, p. X1) which affirmed the judgment of the United States District Court for the Southern District of New York, entered July 14, 1961 (9a-10a*).

Citations to Opinions Below

The opinion of the Court of Appeals is reported in 305 F. 2d 724 (Appendix B hereto, *infra*, p. X3). The opinion of the District Court (Dawson, J.) in denying defendants' motions (343a-414a) for summary judgment dismissing the complaint on the principal grounds of *res judicata* and collateral estoppel is reported in 160 F. Supp. 651 (35a-62a). The opinion of the District Court (Dimock, J.) in granting defendants' motions for a preliminary, separate trial of the defenses of *res judicata* and collateral estoppel is not officially reported (63a-71a). The opinion of the District Court (Dimock, J.), which denied plaintiffs' motion to strike defendants' affirmative defenses of *res judicata* and collateral estoppel for failure to prove a *prima facie* case and upon which judgment to dismiss the complaint was entered, is reported in 198 F. Supp. 677; (11a-34a).

Jurisdiction

The judgment of the Court of Appeals was dated and entered August 1, 1962 (*infra*, p. X2). An order granting an extension of time to and including December 29, 1962 within which to petition for certiorari was made herein by Mr. Justice John M. Harlan on October 29, 1962. The

* Numbers in parentheses, unless otherwise noted, refer to the pages of "Appendix to Plaintiffs-Appellants' Brief" in the United States Court of Appeals, consisting of Volume I, pp. 1a-422a, Volume II, pp. 1b-172b and Volume III, pp. 1c-13c, submitted with this petition.

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Under New York law, do the defenses of *res judicata* and estoppel by judgment based upon the New York state court judgment in the case of *Cadman* v. *Kenyon* justify a dismissal of, and preclude a trial on the merits of, the complaint here?

(2) Were all the issues raised by plaintiffs in this action finally determined and adjudicated in *Cadman* v. *Kenyon?*

(3) Were the interests of each and all the plaintiffs in this action, and of the classes they represent, so adequately represented by the plaintiff in *Cadman* v. *Kenyon* as to bind them by the adjudication of that case?

(4) Are all the defendants in this action entitled to claim the benefits of the adjudication in *Cadman* v. *Kenyon* against all of the plaintiffs herein under the doctrines of *res judicata* and estoppel by judgment?

(5) Have the plaintiffs been deprived of their constitutional rights of due process of law by the decisions below holding that (a) all of the issues herein were finally determined and adjudicated in *Cadman* v. *Kenyon*, and (b) the interests of each and all of the plaintiffs here were represented by the sole plaintiff in *Cadman* v. *Kenyon* with such adequacy as to bind them by the decision in that case, and (c) the defendants in this action are entitled to assert the decision in *Cadman* v. *Kenyon* as a bar to this action although they are not bound by that decision.

(6) Have the plaintiffs herein been deprived of their constitutional rights of due process of law by the proceedings and procedures below?

Statutes Involved

The constitutional provisions and statutes which the case involves are: U. S. Const. Amends. V and XIV, §1; Declaratory Judgment Act, 28 U. S. C. §2201; N. Y. Const. Art. VI, §7 (McKinney's Consolidated Laws, Book 2, Part 2, p. 104); N. Y. Civil Practice Act, §§193, 472, 473 (Gilbert-Bliss Civil Practice of New York Annotated, Book 3 A, p. 35; Book 4, pp. 4, 5); Rule 211 of N. Y. Rules of Civil Practice (Gilbert-Bliss Civil Practice of New York Annotated, Book 10 B, p. 145). They are printed in Appendix F hereto, *infra*, pp. X224.

Statement of the Case

1. Judgment Sought to be Reviewed

The judgment of the Circuit Court of Appeals (Appendix A, hereto, *infra*, p. X1), sought to be reviewed, affirmed the final judgment (9a-10a) of the District Court (Dimock, J.) dismissing the complaint (72a-112a) as amended (165a-169a) and supplemented (170a-182a), without costs, as to all defendants "on the ground that the matters stated therein have been previously adjudicated against all of the plaintiffs herein individually and against each and every class represented by said plaintiffs by the final adjudication on the merits rendered by the Court of Appeals of the State of New York on the 3rd day of December, 1953 in a certain action entitled *"Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated,* against

Helen Kenyon as Moderator of the General Council of the Congregational Christian Churches of the United States." (See, 197 Misc. 124 (1950); rev. 279 App. Div. 1015, 1074 (2nd Dept., 1952); aff'd 306 N. Y. 151, reargument denied, 306 N. Y. 851 (1953).)

The pleadings, opinions, dissenting opinions, orders and judgments in the *Cadman* case were printed below and are submitted herewith.* Because of their especial importance, there are reprinted in this petition, the judgment entered June 3, 1952 on the order of reversal of the Appellate Division (Appendix C hereto, *infra*, p. X14), the order and judgment of the New York Court of Appeals (Appendix D hereto, *infra*, p. X17) and the final judgment entered thereon (Appendix E hereto, *infra*, p. X20) affirming that judgment of June 3, 1952.

2. General Nature of Action

This is an action for a declaratory judgment. Its nature appears more fully from plaintiffs' complaint (72a, 165a, 170a), and statements (248a-342a) filed pursuant to pre-trial orders (242a-245a).

Jurisdiction of the District Court was based on the Federal Declaratory Judgment Act (28 U.S.C. §2201) and diversity of citizenship of parties (28 U.S.C. §1332).

Plaintiffs, suing individually and on behalf of others now similarly situated, are four Congregational Christian Churches and ten individuals, including ministers and members of Congregational Christian Churches, members of defendant General Council of the Congregational Christian Churches and of defendant National Council of Congregational Churches, members of defendant The

* See Vol. II "Appendix to Plaintiffs-Appellants' Brief", pp. 1b-172b.

Annuity Fund for Congregational Ministers and members of corporate boards of other defendant Congregational denominational corporations.

Defendants are Evangelical and Reformed Church, "United Church of Christ" and 13 national, denominational agencies of the Congregational Christian Churches.

This case arises out of a proposed total union, pursuant to a written agreement hereafter mentioned, of the Congregational Christian Churches of the United States and the Evangelical and Reformed Church to form a new denomination called "United Church of Christ", and the actions taken by the defendants to effect such union. This proposed "union", actually, has resulted in a widespread "schism" among the Congregational Christian Churches, many of which have vigorously opposed the "union". The non-assenting, non-uniting group, including plaintiff churches, believes this "United Church of Christ" represents a fundamental departure from basic, historic Congregational polity and principles.

This suit seeks a declaratory judgment determining questions as to the validity, construction and effect of certain provisions of said written agreement, "The Basis of Union of the Congregational Churches and the Evangelical and Reformed Church" with "Interpretations" (112a); and determining questions in respect of the rights, status and legal relations of plaintiffs and those similarly situated, arising out of that agreement and acts taken by defendants in connection with, and since, the formation of defendant "United Church of Christ", and in respect of the several Congregational defendants and their funds, now in excess of $100,000,000, including their rights to participate in the direction, control and use of said funds and in direction, control, activities, functions and services of said organizations.

The specific relief sought is set forth in the complaints (72a; 169a; 182a) and "Statement of Declaratory Relief Requested" (319a-342a).

3. Proceedings Below

The complaint was filed June 20, 1957 (72a-112a). Defendants' motions (343a-414a) for summary judgment dismissing the complaint on various grounds, including *res judicata* and collateral estoppel based on the *Cadman* decision and record, were denied by the District Court (Dawson, J.), with a full opinion (35a-62a; 160 F. Supp. 651), holding, *inter alia:* the parties plaintiff and defendant and the issues herein are different from those in *Cadman;* the adjudication in *Cadman* was not binding upon, or a basis of *res judicata* as to, defendant Evangelical and Reformed Church or any of defendant Congregational corporate boards, as they were not parties there; this is a particularly appropriate action for a declaratory judgment, since it involves "substantial rights of many parties from many different states", and does not deal with "purely ecclesiastical matters which this Court may not consider" but with "substantial civil rights and rights of property".

Defendants then filed answers (113a, 139a, 157a), pleading as affirmative defenses, *res judicata* and collateral estoppel (134a-136a, 149a-150a, 163a, 204a-205a, 234a-236a). The pleaded, prior "determinations" and "adjudications" consist of paraphrasings of statements in the majority *opinion* of the Court of Appeals in *Cadman* (*not* adjudications in the *judgment*). The case was assigned to District Judge Dimock for trial. He granted defendants' motions for a preliminary, separate trial of said defenses (63a).

During extensive pre-trial proceedings the District Court, over plaintiffs' objections, issued three pre-trial

orders (242a, 246a, 247a), pursuant to which plaintiffs filed statements of issues (248a), of plaintiffs' interests in funds and otherwise (277a, 285a) and of facts different from those in *Cadman* (293a).

The District Court summarily abandoned the pre-trial proceedings before completion thereof and without entering an order as to its effect (R. 5897-8)* and ordered commencement of the separate trial. Thereon, defendants offered only the *Cadman* record (R. 17) and rested. Plaintiffs then moved (R. 17-22) to strike the affirmative defenses for failure of defendants to establish a *prima facie* case.

After six days of argument, the District Court permitted defendants to re-open (R. 845), and to introduce, as additional "proofs", defendants' Exhibits G through N, but no testimony, and to again rest (R. 979). Plaintiffs moved, again (R. 982), to strike said defenses. (The District Judge had previously ruled in the pre-trial proceedings that these very exhibits would be admissible as part of plaintiffs' case as proof of alleged "new facts", since *Cadman*, creating new issues.)

The District Court thereafter rendered an opinion denying the motion and ordering "formal resumption" of the separate trial (5a, 11a-34a).

Plaintiffs were accorded merely a *pro forma* "trial". When plaintiffs presented their first witness (R. 2084) the District Judge refused to let him be sworn. He subsequently ruled that none of plaintiffs' witnesses would be permitted to testify (R. 2276, 2279) and none of plaintiffs' documentary evidence would be received (R. 2279); and even denied plaintiffs' request to make a separate record

* "R." refers to the Record on Appeal in the United States Court of Appeals certain parts of which, submitted with this petition, were handed up with the permission of the Court of Appeals in lieu of being printed in the appendices to Plaintiff-Appellants' Briefs.

of their evidence offered, pursuant to Rule 43(c) F.R.C.P. (R. 2291).

The District Court thereupon dismissed plaintiffs' action (R. 2303), precluding plaintiffs from a trial on the merits, and adopted as its final opinion, without amendment, the opinion (11a) denying plaintiffs' said motion. The judgment of dismissal (9a) entered thereon stated that the Court's opinion consituted findings of fact and conclusions of law. Plaintiffs appealed. That judgment was affirmed by the Court of Appeals.

4. Background of the Controversy

Fundamental to an understanding of this controversy is the basic difference in "polity", or form of church government, between Congregational Christian Churches, represented here by plaintiff churches, and defendant Evangelical and Reformed Church.

Congregational Christian Churches are individual autonomous churches, associated in fellowship and known collectively as "The Congregational Christian Churches of the United States". These churches number approximately 5,700. Though often referred to as a "denomination", this communion of churches is not, and never has been, a "denomination" in the sense of a national, unitary, centrally-controlled, creedal, church or denomination.

Part of this communion or "denomination" long has been certain corporations and unincorporated associations (defendants herein) created, supported and maintained by those Churches for purposes of fellowship, cooperation and counsel and as their own agencies in particular and extended fields of their church work, such as home and foreign missions, pensions, publishing, education and church building. One of these is the General Council, the national cooperative and advisory agency of said

Churches. Neither this body, nor any other, has authority to act for or to bind the Churches, individually or collectively, in a matter of church union, or otherwise.

It is basically this feature of its congregational "polity", rather than any other theological or doctrinal beliefs, which distinguish the Congregational Christian Churches from other denominations. Within this voluntary framework, each church is free to adopt its own creed (if any) or constitution, and is not subject to any creed, constitution or control imposed by any other body.

Congregationalism and the Congregational Churches in America began the day the Pilgrims landed at Plymouth on December 21, 1620, whose primary purpose and concern in coming to America was to preserve their peculiar type of church polity, which they believed was the only kind sanctioned by the Bible (*Religion in America*, by William W. Sweet, 1942, at p. 68).

The Evangelical and Reformed Church, on the other hand, is an organization with a typical Presbyterian type of polity. It is a national, incorporated, monolithic, creedal church body having an overhead, central government with legislative, judicial, administrative and ecclesiastical functions and powers. Its constitution and by-laws govern the entire denomination and is the fundamental law of the church, establishing a framework of authority which is binding upon all its ministers, members and congregations and which is exercised through a hierarchical system of judicatories (112a).

The basic differences between Presbyterial and Congregational forms of church government were described in *Watson* v. *Jones*, 13 Wall. (U. S.) 679 (1871); see also, *Attorney General* v. *Town of Dublin*, 38 N. H. 459, 517 (1859) and *Gundmundson* v. *Thingvalla Lutheran Church*, 150 N. W. 750, 29 N. D. 291, 310 (1915).

In January 1947 a joint committee representing defendant General Council of the Congregational Christian Churches and defendant Evangelical and Reformed Church published, for consideration of the two communions, said document or "articles of agreement", called "The Basis of Union of The Congregational Christian Churches and The Evangelical and Reformed Church" (112a, 82a-83a). This was supplemented by the "Interpretations" thereof (112a; 82a-83a).

This document provided for the union of *all of the Congregational Christian Churches*, congregational in polity and *approximately 5,700 in number*, with the Evangelical and Reformed Church, presbyterial in polity, to form a new denomination to be called "United Church of Christ". It provided for a total, organic union of these two communions or "denominations" and their respective members, ministers, boards, commissions, agencies and instrumentalities, into said new, single denomination and church (83a).

It did not contemplate, or provide for, a "union" of said General Council and the Evangelical and Reformed Church, to form the "United Church of Christ".

It did not contemplate that any of the Congregational Christian Churches, members or ministers would *not* become part of the United Church of Christ, or make any provision for such a contingency.

It did not provide for any equitable allocation or division of said national, denominational boards and agencies of the Congregational Christian Churches or of the funds and assets thereof as between the uniting and the non-uniting Congregational Christian Churches.*

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* Following *Cadman*, a committee of experts appointed the General Council to study the principles and polity of Congregationalism, submitted its unanimous report, stating, *inter alia*, that the Congregational Christian Churches have "common property rights" in the funds and properties of their national denominational boards and agencies (defendants here); in the event a majority of such Churches

Recognizing its lack of authority to act on this proposal for the Congregational Christian Churches, the General Council submitted "The Basis of Union" to a vote under "procedures", devised by it and printed in said "Basis", by which it would not vote approval of the union unless 75% of the Congregational Christian Churches, church members, associations and conferences voting had already voted approval. It *never* received the approval of 75% of the Churches or church members voting. Of the then 5,715 Congregational Christian Churches, 2,595, or 46%, either voted "no" (1,162) or did not vote (1,433), and only 3,120, or 54%, voted "yes" (78b).

Despite its failure to obtain greater support for the union, the General Council proceeded to "deem" the vote a "sufficient mandate"; and, just prior to the commencement of the *Cadman* case, it voted to approve the union and was taking steps to consummate same. Such consummation was temporarily halted by the granting therein of a preliminary injunction, and, after trial, of a permanent injunction.

5. Proceedings in *Cadman* v. *Kenyon*

The *Cadman* action was for a declaratory judgment and consequential injunctive relief, brought on April 18, 1949 in New York Supreme Court, Kings County, by Cadman Memorial Congregational Society of Brooklyn, a religious corporation, and Cadman Memorial Church, an unincorporated religious society (together constituting the "Cadman Church", a single, church entity) against said General

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vote to enter a union and a minority thereof decide not to do so, it is not clear which group is entitled to status as the "Congregational Christian Churches"; and in the event of such a union, a fair and equitable arrangement and division should be made concerning such properties now enjoyed in common by the Congregational Christian Churches and concerning ministerial and local church rights and standing (300a-302a).

Council, an unincorporated association, sued in name of its presiding officer, Helen Kenyon. These were the only two parties.

The complaint (1b-55b) sought relief against the General Council alone. The requested declarations related to the power and authority of the General Council to effect the then proposed union of communions provided for in the "Basis of Union" and "Interpretations", and to the rights, status and relations of non-assenting Congregational Christian Churches in respect of the acts taken and threatened by the General Council in connection with that union, as so proposed.

Defendant counterclaimed for a declaratory judgment (69b-72b), also requesting declarations (70b-72b) concerning the power and authority of the General Council and the rights, status and relations of such churches in respect of said acts of the General Council.

After trial, the Supreme Court (Steinbrink, J.) rendered a decision and opinion (77b-110b; 197 Misc. 124) granting judgment on the merits to plaintiffs. This opinion, by stipulation, constituted findings of fact and conclusions of law (111b). A declaratory judgment was thereon entered (111b-118b) containing various declarations (112b), some requested by plaintiff and some by defendant, and an injunction against the General Council (115b).

Defendant appealed. The Appellate Division, Second Department, one justice dissenting, reversed the judgment, on the law and the facts, and dismissed both plaintiffs' complaint and defendants' counterclaim (279 App. Div. 1015, 1074 (2nd Dept.), 1952; and see: 120b, 125b, 136b, 142b).

Defendant General Council then moved to resettle the order of reversal so it would contain specified "findings of fact and conclusions of law" embodying the statements in the majority opinion, and a dismissal "on the merits"

(127b, 128b, 131b-134b). This motion was unanimously denied (135b).

On June 3, 1952 a judgment of reversal was entered thereon (Appendix C hereto, *infra*, p. X14; 145b-147b).

Plaintiffs appealed to the New York Court of Appeals. That Court, two judges dissenting (306 N. Y. 151), affirmed the judgment of the Appellate Division, without costs, in an opinion rendered December 3, 1953 (148b-159b), with a dissenting opinion (159b-165b).

On that Court's order and judgment of affirmance (Appendix D hereto, *infra*, p. X17; 166b-168b), a final judgment was entered in Supreme Court, Kings County (Appendix E hereto, *infra*, p. X20; 171b-172b).

The appellate courts, in *Cadman*, refused the declaratory judgment for lack of jurisdiction caused by the absence of parties deemed indispensable in such an action.

It is on their construction of statements in the *opinion* of the Court of Appeals in *Cadman* that defendants here have based their defenses of *res judicata* and collateral estoppel.

6. Events Since *Cadman*

The final decision in *Cadman* was on December 3, 1953. The factual situation therein was that which existed when that action was commenced in April, 1949.

Many events and actions material to the issues herein have since occurred. (See plaintiffs' pleadings, 72a, 165a, 170a; Statement of Facts, 293a-317a.)

For example: At the "Uniting General Synod" meeting in June 1957, the General Council purported to unite *itself* with the Evangelical and Reformed Church, to form the new, defendant "United Church of Christ". Contrary to the "Basis of Union", this was not a union of "communions" and the persons who purported to form it were

not "the regularly constituted representatives of the Congregational Christian Churches", as required, but merely delegates of the General Council (172a, *et seq.*, 304a); and the General Council had no authority to effect such a union or to join another denomination.

A "Constitution and By-Laws" were subsequently adopted for said United Church of Christ (Defs. Ex. G), (not merely for the General Synod thereof), which established a presbyterial not a congregational form of church government and departed fundamentally from the provisions and *principles* in the "Basis of Union" and "Interpretations" (305a), all contrary to assurances given by the defendant in *Cadman*.

Defendant corporate boards of the Congregational Christian Churches, with total assets in excess of $100,000,000 changed their constitutions and by-laws to become the agencies of said "United Church of Christ". They abandoned their services to the Congregational Christian Churches and deprived plaintiffs, and those similarly situated, of all participation in, direction of, and benefit from, these organizations and their funds, unless they joined "United Church of Christ". They used funds accumulated as Congregational Christian Church agencies for said United Church of Christ, without approval of those churches (174a, 179a, 314a). Defendant National Council of Congregational Churches transferred its funds of approximately $100,000, including trust funds, so as to place them under the direction and control of said "United Church of Christ" (165a-166a, 313a).

Said "United Church of Christ" has adopted a "statement of faith" and professes, in its Constitution creedal and doctrinal beliefs, contrary to Congregational polity and beliefs.

7. The Importance of the Case

This case presents questions national in importance, scope and effect. Its final outcome will directly affect approximately 5,700 churches located throughout this country and over one and one-quarter million members, comprising the historic Congregational Christian Churches of the United States. The official organ of defendant United Church of Christ concedes (Vol. 5, No. 19, p. 18 "United Church Herald", Oct. 18, 1962) that as of October 18, 1962, at least 1,365 Congregational Christian Churches have failed or refused to become part of the United Church of Christ; and they and their ministers and members numbering hundreds of thousands are situated similarly as the plaintiffs herein. In addition to vital and far-reaching questions of status and legal relationships, as between the uniting and non-uniting groups, the property rights sought to be determined include funds and assets held or controlled by defendant boards and agencies of the Congregational Christian Churches, now in excess of $100,000,000.

Now that a wide-spread "schism", instead of a complete "union" of Churches, has actually occurred, this raises questions as to which group of such Churches constitutes the true "Congregational Christian Churches", and what are the rights, legal relations and status of each group in respect of said Congregational Christian Church agencies and boards, their services and their tremendous funds and assets. This is a peculiarly fitting case for determination under the Federal Declaratory Judgment Act. (See *Purcell, et al.* v. *Summers*, 126 F. 2d 390, 393-394 (4th Cir. 1942), aff'ing 34 F. Supp. 421 (1940); cert. den. 317 U. S. 640; *Borchard, Declaratory Judgments*, 2d Ed. pp. 312-14, 686; Judge Dawson's opinion below (53a; *First Cong. Church* v. *Evangelical and Reformed Church*, 160 F. Supp. 651.)

Plaintiffs believe this case is one of first impression as to its major substantive and procedural legal issues. The

doctrines of *res judicata* and collateral estoppel have never been so drastically and sweepingly applied. Important due process of law issues are involved. There is no dispute that the Congregational Christian Churches are autonomous and have historically banded together to establish, support and maintain agencies for their national and international church work and projects, such as home and foreign missions, publications, religious education, church building and loans and pension plans. There is, in this, no "national church" or overhead ecclesiastical body. One substantive issue of first impression is whether the national boards and agencies of the Congregational Christian Churches by their own actions can transfer their control, functions, benefits and funds to a new or different denomination, free from any obligation or responsibility to those Churches, ministers and members who choose to continue as Congregational Christian Churches. The determination of this issue affects not only the Congregational Christian Churches, but all denominations governed by Congregational polity, such as Baptists (91,931 churches, 21,374,126 members), Unitarian Universalists (665 churches, 151,557 members), and Disciples of Christ (8,001 churches, 1,801,821 members).

Other suits, arising out of this "union" and "schism," are pending in several states.

Reasons For Granting Writ

(1) The Court of Appeals Has Rendered a Decision Which Is In Conflict With Applicable Decisions of the Supreme Court, and Has Deprived Petitioners of Their Constitutional Rights of Due Process of Law.

Decisions of this Court have established the rule of law that in order for a judgment to constitute a bar to another suit, it must be determined on the merits and "if the first suit was dismissed for defect of parties or the want of

jurisdiction, or was disposed of on any other grounds which do not go to the merits of the action, the judgment rendered will prove no bar to another suit", *Costello* v. *U. S.*, 365 U. S. 265, 286 (1961); *Hughes* v. *U. S.*, 4 Wall. 232, 237 (1866); *House* v. *Mullen*, 22 Wall. 42, 46 (1874); *Swift* v. *McPherson*, 232 U. S. 51, 56 (1914); *St. Romes* v. *Levee Steam Cotton Press Co.*, 127 U. S. 614, 619 (1888); *Murray* v. *Pocatello*, 226 U. S. 318, 323-4 (1912).

This Court has ruled that there must be at least one adjudication of the rights between the parties before there can be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit; and that such a right has been adjudged "must appear affirmatively" in the first suit. *Haldeman* v. *U. S.*, 91 U. S. 584, 585-6 (1875); *Costello* v. *U. S.*, 365 U. S. 265, 285 (1961).

Furthermore, under decisions of this Court, in order for a judgment to constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on the merits, *Costello* v. *U. S.*, *supra*; and the judgment in a prior action can operate as an estoppel only as to matters in issue actually litigated *and* determined in a prior action, *Cromwell* v. *County of Sac.*, 94 U. S. 351 (1876); *Commercial Publishing Co.* v. *Beckwith*, 188 U. S. 567 (1903); *Russell* v. *Place*, 94 U. S. 606 (1876).

Under decisions of this Court due process of law is particularly pertinent to an attempt to dispose of a litigation on the issues of *res judicata* or collateral estoppel. There is a *prima facie* denial of due process if a party sought to be bound by the assertion of the plea was not, in fact, a party or privy to the prior adjudication. *Postal Telegraph Cable Co.* v. *City of Newport, Kentucky*, 247

U. S. 464, 472, 474-5 (1918); *Hansberry* v. *Lee*, 311 U. S. 32 (1940).

This Court has decided that if a court is without power or jurisdiction, for lack of parties or otherwise, to grant the relief prayed for, whatever the merits of the action might be, it could not decide what the merits were, and a judgment of dismissal therein cannot be made *res judicata* by reason of references in an opinion in which the court expresses its views on the merits *Murray* v. *Pocatello*, 226 U. S. 318, 323 (1912); *Harriman* v. *Nothern Securities Co.*, 197 U. S. 244, 291 (1905).

The decisions below of the Court of Appeals and the District Court are in direct conflict with the above applicable and controlling decisions of this Court and have resulted in a violation of plaintiffs' constitutional rights of due process of law.

The *Cadman* action, both as to plaintiff's complaint (15b-17b) and defendant's counterclaim (69b-72b), was for a declaratory judgment of certain rights and legal relations of the parties thereto (N. Y. Civ. Prac. Act §473). Both the complaint and counterclaim were dismissed, for the New York Courts' lack of jurisdiction and power to grant such a declaratory judgment in the absence of indispensable parties. This "appears affirmatively" and is obvious from both the majority and minority opinions in the Appellate Division (138b, 139b; 279 App. Div. 1074, 1075-6) and in the Court of Appeals (159b, 162b-163b; 306 N. Y. 151, 167).

In dismissing that action on this ground, both appellate courts cited and applied the rule of *Manhattan Storage and Warehouse Co.* v. *Movers Association*, 289 N. Y. 82, 88 (1942) and *Wood* v. *City of Salamanca*, 289 N. Y. 279, 282 (1942); N. Y. Civ. Prac. Act §193, that the Court must refuse a declaratory judgment where all persons who are interested in, or might be affected by the enforcement of

"rights" and "legal relations" and "whose absence will prevent an effective determination of the controversy" are not parties to the action and did not have opportunity to be heard. In so dismissing the *Cadman* action for that reason the New York appellate courts adopted the very position taken throughout the proceedings therein by the defendant, in its motions to dismiss and briefs (383a-386a; 405a-414a). Moreover, this is the precise rule of New York law for which the *Cadman* case has since been cited *Terner* v. *City of Peekskill*, 124 N. Y. S. 2d 24 (1953); *Siegel* v. *Finnerman*, 282 App. Div. 878 (2nd Dept., 1953).

The dismissal in *Cadman*, therefore, was not, and could not have been, on the merits. This is clear, too, from the face of the judgments therein. The order and judgment of the New York Court of Appeals did not "adjudicate" a dismissal on the merits, but simply affirmed the judgment entered upon the Appellate Division's decision and order (171b-172b; Appendix D, hereto, *infra*, p. X17). The Appellate Division's order and judgment did not adjudge the dismissal of the complaint or of the counterclaim to be on the merits (144b, 146b; Appendix C, hereto, *infra*, p. X14); and that Court expressly and unanimously refused, on defendant's motion, to make the dismissal of the complaint "on the merits" (127b, 131b, 134b, 135b-136b).

Thus, the decisions in the court below on this point are in direct conflict with the controlling decisions of this Court in the *Costello*, *Hughes*, *House*, *Swift*, *St. Romes* and *Murray* cases, *supra*.

The parties plaintiff, as well as the parties defendant, in this action are not the "same" as those in *Cadman* (District Judge Dawson correctly so ruled herein in denying summary judgment (49a-50a), but the Court of Appeals and the District Court erroneously held otherwise).

The issues or "points of controversy" in *Cadman* were not the "same" as those herein and were not "determined on the merits". The matters in issue herein were not "actually litigated *and* determined" in *Cadman*. Even the limited issues litigated in *Cadman* were not "determined" therein. As noted, the appellate courts in *Cadman* specifically held that absence of indispensable parties "prevented an effective determination of the controversy" or the granting of declaratory judgment relief requested by both parties (N. Y. Civ. Prac. Act §§193, 473; cf. *Costello*, *Cromwell*, *Commercial* and *Russell* cases, *supra*).

In holding that the various plaintiffs in this action are bound by, although none of them were parties in, *Cadman*, the Courts below are in conflict with the decisions of this Court in the *Hansberry* and *Postal Telegraph* cases and have misapplied the legal principles of those cases which are rightly applicable to this suit.

Since a declaratory judgment was refused in *Cadman* for lack of jurisdiction due to absence of parties, there has not been "at least one adjudication" of the "rights" and "legal relations" of the parties thereto, let alone of the "rights" and "legal relations" of the parties to this action (cf. *Haldeman*, *supra*, and *Costello*, *supra*; and *Restatement of Judgments*, Section 77b).

Since the New York Court of Appeals, for lack of power and jurisdiction to grant a declaratory judgment, could not determine the merits of the *Cadman* action, the Courts below could not make the judgment dismissing that action *res judicata* here on the basis of references in that Court's opinion relating to the merits of the action; and yet that is what they have done (cf. *Murray* and *Harriman* cases, *supra*).

The net effect of the decisions below has been to whipsaw, between the state and federal courts, churches, min-

isters and members, legitimately seeking a declaratory judgment of their "rights" and "legal relations", in respect of the situation which has arisen out of the aforesaid "union" of communions and the resultant "schism" among the Congregational communion.

In *Cadman*, the Cadman Church was denied a declaration and adjudication of its rights and legal relations by the state court for lack of power and jurisdiction, more especially, because of the absence there, as parties, of the Congregational corporate boards and agencies, the Evangelical and Reformed Church and the "United Church of Christ" (now defendants herein). Those were the very parties which the defendant and the courts in *Cadman* asserted had to be before the court before such a declaratory judgment could be granted (138b, 159b, 162b; 382a-386a, 405a-414a). In *Cadman*, the state courts specifically stated that such rights and legal relations should be determined, and that the declaratory judgment remedy would be "available", in an "appropriate action" in which such parties would be brought before the court (159b, 163b, 138b-139b).

The plaintiffs in this action complied with that mandate of the New York courts in *Cadman* and brought this "appropriate action" in which all of those parties were named as defendants and the plaintiffs herein allege civil and property rights and interests, including those in the defendant Congregational corporate boards and their funds, entitling them to a declaratory judgment of their rights and legal relations. *Purcell* v. *Summers*, 126 F. 2nd 390 (4th Cir. 1942); cert. den. 317 U. S. 640 (1942). On the one hand, in *Cadman*, relief was denied because of absence of necessary, affected parties. On the other hand, below, declaratory relief has been denied on the ground that *Cadman* is *res judicata* as to all parties, plaintiffs

and defendants, and as to all issues raised by the pleadings herein.

The denial in this second suit, on grounds of *res judicata* and collateral estoppel, of the very remedy which, in the first suit, the state courts said would be available" in such an "appropriate action", is clearly a denial of due process of law under the Federal Constitution and the above decisions of this Court (See, also, *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 679-80 (1930).

(2) The Courts Below Have Decided Important Questions of New York Law In a Way In Conflict With The Applicable Law of New York.

Jurisdiction being conferred by diversity of citizenship, the Courts below were required to follow the law and policy of New York as to the scope and elements of *res judicata* and collateral estoppel, as asserted defenses. *Angel* v. *Bullington*, 330 U. S. 183 (1947); *Fidelity National Bank* v. *Swope*, 274 U. S. 123, 130-31 (1927).

The United States Court of Appeals affirmed, without comment, the holding of the District Court that "the matters of fact and law necessarily determined by the Court of Appeals in reaching its conclusion that the plaintiffs were not entitled to the declarations and injunctive relief sought constituted adjudications binding upon the litigants". *First Congregational Church* v. *Evangelical & R. Ch.*, 198 F. Supp. 677, 679 (1961). These assumed "determinations" were held to encompass the wide spectrum of issues raised by all of the plaintiffs in this suit. In so holding, the Courts below decided important questions of local law in a way in conflict with applicable New York decisions and with the law of the *Cadman* case itself.

The stated basis for the dismissal of this suit by the Courts below is the decision and "determination" in *Cad-*

man The judgment of the Appellate Division in *Cadman*, affirmed by the New York Court of Appeals, states there were questions of doctrine, polity and ecclesiastical matters determined in the declaratory judgment of the trial court which "were not considered by said Appellate Division and as to which it has made no determination" (146b; Appendix C hereto, *infra*, p. X15). However, the District Court predicated its dismissal of this suit on the ground that the New York Court of Appeals had "necessarily determined" the issues herein in respect of the "Basis of Union" (13a-14a). Yet those are the very matters of doctrine and polity which were expressly left undecided by the New York Courts. Now, the U. S. Court of Appeals has held that it is unclear and doubtful whether such issues were determined or avoided by the N. Y. Court of Appeals (Appendix B hereto, *infra* p. X12*).

Under New York law, the N. Y. Court of Appeals did not, and could not, have determined such issues on the merits; but, actually, the ground of any such determination would have made a material "difference". A determination for lack of cognizance (or jurisdiction) would not be on the merits, but would be the very antithesis thereof. *Weissman* v. *Euker*, 1 App. Div. 2d 30, 147 N. Y. S. 2d 101 (3rd Dept. 1955). Yet, even in face of this admitted doubt, the Circuit Court of Appeals has held that plaintiffs are not entitled to have such issues determined in this action.

Under New York law, the doctrine of collateral estoppel is that where a second suit is based upon a different cause

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* "While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil Courts, it would make no difference to the resolution of the issues presented here which of these grounds of decision was in fact adopted."

of action, the prior judgment will operate as a bar between the same parties only to estop the relitigation, collaterally, of those specific matters placed in issue *and* actually determined in the prior action. *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14, 17, 18 (1937); *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956); *Rudd* v. *Cornell*, 171 N. Y. 114 (1902); *Cook* v. *Conners*, 215 N. Y. 175 (1915); *City Bank Farmers Trust* v. *Macfadden*, 13 A. D. 2d 395 (1st Dept. 1961); *Lipkind* v. *Ward*, 256 App. Div. 74 (3rd Dept. 1939); 7 Carmody-Wait New York Practice, §§186-194. The Federal rule is the same, as noted above. *Cromwell* v. *County of Sac.*, 94 U. S. 351 (1876).

There was no foundation for a defense of estoppel by judgment here because, under New York law, there was no prior judgment determining the merits of the issues in this suit. The Courts below have construed the *opinion* of the New York Court of Appeals in *Cadman* v. *Kenyon* as a declaratory judgment. There are a number of reasons why this is not permissible under New York law as expressed in its statutes and by decisions of its highest courts.

The *Cadman* action was for a declaratory judgment and defendant therein counterclaimed for declaratory judgment. The rule in New York is the general rule, that in declaratory judgment actions no adjudications are deemed made unless expressed in declarations found in a judgment. *Kittinger* v. *Churchill*, 161 Misc. 3, 13, 14 (1936), aff'd 249 App. Div. 703 (4th Dept. 1936); *Restatement of Judgments*, Section 77(b). The New York Court of Appeals affirmed the Appellate Division's dismissal of defendant's counterclaim, as well as plaintiffs' complaint and no declaratory *judgment* on any subject or issue was made or granted in *Cadman*.

In and of itself, the dismissal of a complaint which seeks a determination of rights in the form of a declaratory judgment does not determine the rights of the parties, especially a dismissal for want of jurisdiction or parties. *Gray-Lewis* v. *Gray-Lewis*, 157 N. Y. S. 2d 845, 816 (1956). Moreover, the Appellate Division in *Cadman* unanimously and specifically denied defendant's motion to have the dismissal constitute such a determination (127b-136b).

Also, the New York Court of Appeals has no power to grant a declaratory judgment. It cannot do so either by a judgment or an opinion. That power is by statute vested in the Supreme Court. N. Y. Civ. Prac. Act §473; *Bank of Yorktown* v. *Boland*, 172 Misc. 885, 887 (1940), aff'd 259 App. Div. 987, aff'd 284 N. Y. 749 (1940).

Nor can the New York Court of Appeals find facts for itself as to matters upon which no finding was made either by the trial court or by the Appellate Division. N. Y. Constitution, Art. VI, §7 (Appendix F hereto, *infra*, p. X23); 9 Carmody-Wait Cyc. N. Y. Practice, §226, p. 427. The only power it possesses is to "choose between the findings of the Special Term and the new findings of the Appellate Division," if such have been made. *Matter of City of N. Y.*, 1 N. Y. 2d 428, 430 (1956); *People ex rel. MacCracken* v. *Miller*, 291 N. Y. 55, 61 (1943); *Harrington* v. *Harrington*, 290 N. Y. 126, 130, 131 (1943).

The Court of Appeals did not, and could not, make any new declarations, findings or adjudications.

To the extent, then, that the Courts below have found the basis for their decision in matters of fact "necessarily determined by the Court of Appeals", they have attempted to circumvent New York law by holding that the facts required to justify their decisions were "necessarily determined" by the Court of Appeals, even though such facts expressly had not been found by the Appellate Division

and could not, under applicable New York law, have been found by the Court of Appeals.

Under New York law, the assertion of the defense of collateral estoppel requires the courts to ascertain what was "litigated" and "decided" in the former action pleaded in bar. *City Bank Farmers Trust* v. *Macfadden*, 13 A. D. 2d 395, 400-401 (1st Dept. 1961); *Rudd* v. *Cornell*, 171 N. Y. 114."

The Courts below *conclusively* presumed that every *statement* in the *opinion* of the Court of Appeals constituted "findings of fact and conclusions of law" and "binding adjudications" (R. pp. 5831-4; 1411-14). Worse, where the Courts below could find no statements in that *opinion* to support their holdings, they resorted to what they thought the Court of Appeals must have "contemplated" (24a, 25a). The true test of *res judicata* or collateral estoppel is not what a court may, or may not have, "contemplated", or even statements made in its "opinion". The actual and ultimate adjudication and determination in *Cadman* must be found in the judgments and in all of the proceedings leading thereto, keeping in mind it was an action for a declaratory judgment.

The sole "adjudication" of the Court of Appeals in *Cadman* was found in its order and judgment (166b-168b, 171b-172b; Appendix D, E, hereto, *infra*, pp. X17-X21), which merely adjudged "that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs". The only "adjudications" in said judgment of the Appellate Division entered June 3, 1952 were that the complaint and the counterclaim be dismissed, with costs (145b-147b; Appendix C hereto, *infra*, pp. X14-X16).

Not one of these orders and judgments contained any declarations, findings or determinations or any "adjudi-

cations", except as noted. None of them provided for a dismissal of the complaint "on the merits".

It is perfectly apparent from the majority and minority opinions of the Appellate Division and of the Court of Appeals that the dismissal in *Cadman* was for lack of power and jurisdiction to grant a declaratory judgment in absence of necessary, affected parties (138b-139b; 279 App. Div. 1074, 1076; 159b; 162b-163b; 306 N. Y. 151, 169). That is the rule of law for which the *Cadman* case has since been cited (See *Terner* and *Siegel* cases, *supra*).

For example, the Appellate Division said in its opinion (138b):

> "In any event there should have been no declaration of the rights of plaintiffs with respect to the funds and assets held by the corporate societies and agencies. If any declaration is to be made with respect to plaintiffs' rights in or to such funds, or if it is to be determined that such funds are subject to a trust which may be enforced at the instance of plaintiffs, such determination should be made only in an appropriate action or proceeding in which such corporate societies and agencies may be before the court as parties."

The majority opinion in the Court of Appeals was to the same effect (159b).

The minority opinion in the Appellate Division stated (139b):

> "I cannot agree that the trial court had no jurisdiction to determine this matter. • • • Thus, I believe the court's jurisdiction is clearly established and a definite question is laid before us for determination."

The minority opinion in the Court of Appeals stated (162b):

"We are all in accord that there is no ecclesiastical question in this case. . . .

"We also agree that there should have been no declaration either by Special Term or the Appellate Division as to the rights of plaintiffs with respect to the funds and assets held by the various corporate societies and agencies until the latter were brought before the court as parties. As to such funds, which we are told amount to upwards of $60,000,000, plaintiffs may well have rights in the way of continued service and otherwise, by reason of their contribution of many tens of thousands of dollars over the years. Whatever these rights—which may only be determined when the necessary parties are before the court—they may not be stripped from plaintiffs simply because they choose to remain independent Congregational Churches. Good faith and Christian understanding on both sides should solve such problems as they actually arise; should such understanding not come to pass, plaintiffs may then urge whatever rights they claim to have, and which they assert are impinged upon, in an appropriate action with all necessary parties before the court. Because we cannot pass upon them at this time is not to say that they have no rights."

It is manifest that in this last quotation "We also agree", refers to *all* of the members of the Court of Appeals.

On this point the Appellate Division and the Court of Appeals cited N. Y. Civ. Prac. Act. §§193, 473; and *Manhattan Storage & Warehouse Co.* v. *Movers Assn.*, 289 N. Y. 82, 88 (1942) and *Wood* v. *City of Salamanca*, 289 N. Y. 279, 282 (1942).

These citations are revealing. C.P.A. Section 473 provides for declaratory judgments. C.P.A. Section 193 relates to indispensable parties, defining them as persons

"whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the Court." *Manhattan Storage* and *Wood* are leading New York cases for the rule that a court must refuse a declaratory judgment in absence of persons who would be affected by such judgment.

In so far as any other issues of the case were discussed in its opinion, such discussion was simply *dicta* and not binding on anyone. It was not enforceable against anyone. It did not constitute declarations, adjudications or determinations which had "the force of a final judgment" (N. Y. Civ. Prac. Act §§472, 473).

It is clear that, under New York law, *res judicata* is a doctrine of estoppel by "judgment" and not estoppel by "opinion". Even findings of fact contained in a decision or opinion do not have the force and effect of the thing adjudged unless the subject matter is "definitely disposed of by the judgment". *Walfrice* v. *Buffalo Pottery Co.*, 176 Misc. 472, 474; 27 N. Y. S. 2nd 487; aff'd, 263 App. Div. 787 (4th Dept., 1942) *Silberstein* v. *Silberstein*, 218 N. Y. 525 (1916); *People* v. *McCanliss*, 255 N. Y. 456, 459 (1931).

Moreover, in New York, a declaratory judgment has a particular form, containing express declarations of the rights of the parties as well as findings of fact. *Salzman* v. *Sakofsky*, 195 Misc. 166 (1949).

It is the "judgment" which constitutes the "*determination*" of the rights of the parties in an action, especially in a declaratory judgment action. The "determination" is not the "opinion"; it is the *judgment* (N. Y. Civ. Prac. Act §§472, 473).

The precise difficulty with what the defendants have asserted and the Courts below have decided herein

as to what *Cadman* "adjudicated", is that these assertions and their decisions rest *entirely* on the statements in that opinion not "essential to dispose of the case", and cannot, under the law of New York or the decisions of this Court, support a defense of *res judicata*. *City Bank Farmers Trust* v. *Macfadden, supra; Murray* v. *Pocatello, supra; Stokes* v. *Stokes*, 155 N. Y. 581, 592 (1898); *Ripley* v. *Storer*, 309 N. Y. 506, 512 (1956).

The Court of Appeals held, as a matter of law, that "no legal issue not determined by *Cadman* is raised by the present complaint" (Appendix B, hereto *infra*, p. X11; 305 F. 2d 724, 728) and that defendants here, though not bound or burdened by *Cadman*, can claim its benefits. In so holding, the Courts below necessarily are saying that the events which have occurred, and the actions which have been taken by the defendants, since *Cadman* are not material and raise no new issues. Such a holding is in conflict with the law of New York (*Mullane* v. *McKenzie*, 269 N. Y. 369, 373 (1936)) and decisions of this Court (*Third National Bank of Louisville* v. *Stone*, 174 U. S. 432, 434, (1899)) holding that a prior judgment cannot bar a subsequent action involving new facts creating new legal relations and altered rights. The law of New York is that "where the issue in the second action differs *in any way* from that in the earlier action, the plea (i.e., *res judicata*) of course, is not available". *Good Health Dairy Prod. Corp.* v. *Emery*, 275 N. Y. 14, 17-8 (1937); *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116, 119 (1956). It is apparent from plaintiffs' Statement of Issues (248a-273a), and plaintiffs' Statement of Facts (293a-317a) that many new material facts have occurred since *Cadman* and the issues herein are not identical with those in *Cadman*.

The law of New York is, as Judge Cardozo stated it in *Schuylkill Fuel Corp.* v. *Nieberg*, 250 N. Y. 304, 307 (1929)

that where the issues in two actions are not identical, even though the parties are the same, "the estoppel is limited in such circumstances to the point actually determined", (citing *Cromwell* v. *County of Sac*, 94 U. S. 351) and the test of what was "actually determined" is stated at p. 308:

> "The decisive test is this, whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second."

If, as defendants maintain, and the Courts below have held, they are not bound by the decision in *Cadman*, there were no rights or interests of the defendants established by the *Cadman* judgment which could be destroyed or impaired; Cf. *Davies* v. *Stumpf*, 262 App. Div. 499, 31 N. Y. S. 2d 1000 (1st Dept. 1941) and *Gart* v. *Cole*, 166 F. Supp. 129, aff'd. 263 F. 2d 244 (2nd Cir. 1959).

For example, the *Cadman* judgment (146b; Appendix C hereto p. X15) stated that the Court had "made no determination" and had "not considered" questions of doctrine, polity and other ecclesiastical matters. There are very important issues herein involving those questions. Plaintiffs also, here raise issues regarding changes made since 1957, in various charters, constitutions and by-laws which change the control of defendant congregational boards and agencies, their functions and funds. Also, issues have been raised with regard to actions taken since the formation of the "United Church of Christ" in 1957 involving the status of the plaintiff ministers and their pension contracts and affecting the status of mortgages held by defendant Congregation Church Building Society on Congregational Christian Churches (1C-13C).

These are but three examples of issues raised here which are different, under the New York test, from the

issues raised in *Cadman*. Their determination here would not destroy or impair the rights or interests, if any, of the defendants established by the *Cadman* judgment.

In sum, the decisions below have disregarded and are in conflict with basic applicable principles of New York law, and by this clearly erroneous and destructive judicial process plaintiffs have been deprived of due process of law under the Fifth and Fourteenth Amendments of the Federal Constitution.

(3) The Courts Below Have Deprived Plaintiffs of Due Process of Law in Violation of the Fifth or Fourteenth Amendments In Holding, Contrary to Decisions of This Court and the Law of New York, That They Are Bound By "Adjudications" In *Cadman* v. *Kenyon*, To Which They Were Not a Party and in Which They Were Not and Could Not Have Been Represented.

Whether or not plaintiffs in this action are bound by the adjudications in *Cadman* (whatever those "adjudications" are held to be) is to be determined by New York law. *Angel* v. *Bullington*, 330 U. S. 183 (1947).

But, in holding plaintiffs so bound under the law of New York the Courts below have deprived them of due process of law either in violation of the Fourteenth Amendment or the Fifth Amendment, or both, whether or not their view of New York law was correct or wrong. *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464 (1917).

The doctrine of collateral estoppel cannot be applied against a party unless he has directly or representatively litigated in an earlier action the same matter to be foreclosed.

> "The opportunity to be heard is an essential requisite of due process of law in judicial proceed-

> ings. * * * And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, * * * so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein." *Postal Telegraph Cable Co.* v. *Newport, supra,* at p. 476.

Plaintiffs have been deprived of due process of law by the Courts below because they have been denied a first determination of their rights, status and legal relations herein on the erroneous ground it would be *their* second. This foreclosure by the Courts below is predicated expressly on the ground that ten years earlier a single Congregational church brought a "class action" which resulted, under New York law, in an "adjudication" of the rights and legal relations of the plaintiffs herein, as ministers, members of churches, members of defendant boards, which is binding on them *now* despite the fact that they were not named as parties to that action, had no notice that it was brought in their behalf because it did not purport to be so brought, and have interests not common to the plaintiff in that action or each other. This foreclosure was, under the circumstances, a deprivation of due process under the decisions of this Court. *Hansberry* v. *Lee,* 311 U. S. 32; *Postal Telegraph Cable Co.* v. *City of Newport, supra.*

Plaintiffs sue both individually and on behalf of others similarly situated. None of these plaintiffs was a party to, or represented in, the *Cadman* case. District Judge Dawson so held, in denying defendants' motions for summary judgment, irrespective of whether the *Cadman* action was considered a true class action, hybrid class action or spurious class action (50a).

There are, at least, two dispositive reasons why plaintiffs here are not bound by the "adjudications" in *Cadman*, whatever those may be viewed to be.

First, the *Cadman* action was not a "class action" of such a nature as to bind parties not named as such. The fact that the *Cadman* Church entitled its suit as one brought on behalf of itself and churches "similarly situated" does not make it such a class action. *Hansberry* v. *Lee*, *supra*.

Second, and more obvious, there was no representation in *Cadman* of the interests of plaintiffs here adequate to support a constitutional application of the doctrine of collateral estoppel. *Hansberry* v. *Lee*, *supra*; See 132 A.L.R. at p. 750; 3 Moore's *Federal Practice*, Par. 23.04.

The Court below held plaintiffs here to have been represented in *Cadman* by the following test:

> "The question whether in a particular suit the interests of an entire class are common and the representative shares then will depend on the specific issues raised and decided in that litigation. See *Brenner* v. *Title Guarantee & Trust Co.*, *supra*, 276 N. Y. 230, 11 N. E. 2d 890, 114 A. L. R. 1010. Thus to decide whether plaintiffs were or could be represented in the *Cadman* litigation, we must also determine what the New York courts decided there."

This test is fallacious and *Brenner* v. *Title Guarantee & Trust Co.* does not support such a test, either standing alone or as construed by this Court in *Hansberry* v. *Lee*, *supra*, at p. 45.

It is not necessary "to determine what was decided in *Cadman*" to decide whether the plaintiffs here were represented there.

But the test of binding representation is not whether the complaint in *Cadman* and in this suit allege the same

source of legal wrong, but whether the interests wronged are the same. *Hansberry* v. *Lee*, *supra*.

It seems too obvious for argument that the single church and sole plaintiff in *Cadman* could not represent therein, as "*common*" to all, the varying interests of all of the Congregational Christian Churches, the ministers of churches, the members of churches, and the members of defendant Congregational boards that are plaintiffs herein, and the separate classes which each represents; that members of corporate societies cannot be represented by a church which is not a member of that society; that ministers may not be represented, individually, by a church; that individual members of a church cannot be represented by a church of which they were not a member and none of whose members was a party; and that churches with mortgages may not be represented by churches without mortgages.

Each of plaintiff classes has distinct interests, peculiar to them, which are not "united with" or "common" to either the interests of the other classes of plaintiffs or to the interests of the Cadman Church in the *Cadman* action. "Community of interest"—whatever that phrase may mean—is not the equivalent of being "united in interest" or having a "common interest" and that is what is required by *Brenner* v. *Title Guarantee & Trust Co.*, 276 N. Y. 239 (1937).

Plaintiffs set forth in their complaints (72a, 165a, 170a) as well as in their statement of interests (276a-284a, 285a-292a, 243a-244a) the interests claimed by each of them individually and as a class (1) in the funds of the defendants and (2) other than interests in funds. These clearly showed that here the plaintiffs, as classes each having members too numerous join as party plaintiffs, bring this suit for declaratory judgment as to each of their separate

and distinct complexes of rights, status and other legal relationships in respect of the defendants herein and their funds.

The law of New York does not permit finding the plaintiffs in this suit and the classes they represent to have been adequately represented in *Cadman* by the single, separately wronged, church there plaintiff *Bouton* v. *Van Buren*, 229 N. Y. 17, 22 (1920); *Brenner* v. *Title Guar. & Trust Co.*, 276 N. Y. 230, 236 (1937); *Society Milion Athena* v. *National Bank of Greece*, 281 N. Y. 282, 292-293 (1939); *Kovarsky* v. *Brooklyn Union Gas Co.*, 279 N. Y. 304, 314 (1938).

These considerations of "representation" are *not* technicalities. They are safeguards against an unconstitutional application of the doctrine of collateral estoppel of which this Court warned in *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 58-59 (1908).

The Courts below by their erroneous interpretation and application of *Hansberry* v. *Lee* and *Brenner* v. *Title Guarantee & Trust Co.* have deprived these plaintiffs of due process of law under the Fifth or Fourteenth Amendments, or both.

(4) The Court of Appeals Has Sanctioned a Course of Conduct By the District Court Which Deprived Petitioners of Procedural Due Process of Law and So Far Departed From the Accepted Course of Judicial Proceedings As to Call For the Exercise of the Supervisory Powers of This Court.

Shortly after the action started, in 1957, defendants moved for summary judgment dismissing the complaint on grounds of *res judicata* and collateral estoppel based on the decision in *Cadman* (343a-414a). The District Court (Dawson, J.) denied those motions, rendering a full

and careful opinion (35a-62a). Judge Dawson had before him the complete record of proceedings and all of the briefs filed in *Cadman*. He held *Cadman* was not a bar, and there should be a "trial of the action" (61a)—not merely a trial of those defenses.

Thereafter, District Judge Dimock, to whom the case was assigned for trial, disregarded and overruled Judge Dawson's decision (14a). This did not "preserve the orderly functioning of the judicial process". *TCF Film Corporation* v. *Gourley*, 240 F. 2d 711, 714 (3rd Cir., 1957). He promptly granted defendants' motions for a separate preliminary trial—a move designed to short-circuit a trial on the merits—and did so over plaintiffs' objections that the issues thereon would be so closely entwined with the merits that prejudice and no benefit would result from such a procedure.

This separate trial turned out to be a travesty on justice. It was not really a "trial" at all—it consisted almost entirely of prolonged argument by the attorneys, and a reargument of the summary judgment motion. Not a witness was sworn. There was no opportunity to examine or cross-examine witnesses.

Extensive pre-trial proceedings were held during which, over plaintiffs' opposition, the Court framed and issued three pre-trial orders and required plaintiffs to file various "statements" pursuant thereto.

In the pre-trial proceedings the District Judge disregarded the pleadings, in favor of such "statements", stating:

> "Pleadings have become largely formalities in this court, and I think we can proceed even though the issue is perhaps not joined in the common law sense * * * the fact that it is in the complaint does not make any difference" (R. 4473).

The Court abruptly terminated the pre-trial hearings before completion and ordered the trial to commence twelve days thereafter; and in doing so, he denied plaintiffs' request for a written pre-trial order delineating with some certainty the many rulings made thereon including numerous rulings on "admissible" lines and items of evidence.

On the separate trial, after plaintiffs had offered, and rested on, the record and briefs in *Cadman*, plaintiffs moved to dismiss the defenses for failure of proof. After six days of argument, the Court permitted defendants to re-open and to put in additional evidence consisting of Exhibits G through N—which the Court had previously ruled would be admissible by plaintiffs as material new facts occurring since *Cadman*. Upon plaintiffs' renewal of their motion to dismiss and their refraining from offering their proofs until that motion was decided, the District Court, on its own, marked into the record numerous documents as "Court Exhibits" (Court Exhibits 4 through 56; R. p. 1913). It is not a proper function of a judge to adduce evidence. (Wigmore on Evidence, 3. Ed., Vol. IX, §2483, p. 266.)

During the extended argument of plaintiffs' renewed motion, the District Court disregarded plaintiffs' contention that expert testimony and evidence would be necessary for the Court to properly evaluate the ecclesiastical documents and issues before it. It, also, assured counsel that if the motion to dismiss was denied, plaintiffs would have an opportunity to introduce their evidence on the *res judicata* issue, stating:

> "I don't see how you can lose. You made a motion to dismiss this defense. Insofar as you fail to dismiss the defense, you still have an opportunity to go in with your evidence. It doesn't end the case" (R. 988).

But, when the District Court denied the motion, it "did end the case". The "formal resumption of the trial" referred to in its opinion (34a) was precisely that—a mere formality. At the outset, Judge Dimock made it clear that his decision was intended to be final and complete on the issue of *res judicata* and no proofs plaintiffs could offer would affect the result. The Court refused to allow plaintiffs' first witness to be sworn; and then ruled that none of plaintiffs' witnesses could testify and none of plaintiffs' documentary evidence would be received. Even plaintiffs' request to make a separate record of their evidence offered (Rule 43 c, FRCP) was denied. The District Court thereupon dismissed plaintiffs' action, adopting as its final opinion, without amendment, the opinion denying plaintiffs' said motion. Thus terminated plaintiffs' "appropriate action" (suggested by the courts in *Cadman*) after four years, without a trial on the merits or even an opportunity to present their evidence on the separate trial.

These proceedings were not due process of law.

By its acts the trial court departed drastically from recognized trial procedure, and due process. The trial afforded must be a real one and not a mere pretense. A trial includes, at least, the right to introduce evidence. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 164 (1950); *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349, 368-9 (1935).

Plaintiffs and those similarly situated are simply seeking a declaration of their rights, status and legal relations in light of the existing "union" and "schism". The New York Court of Appeals clearly indicated that such rights and relations could not be "stripped" from them simply because they chose to continue as Congregational Christian churches, members and ministers (163b). This would be "catastrophic", as Judge Steinbrink said in *Cadman* (91b-92b).

This case is difficult and unusual. The legal and factual issues are complicated. But the parties, under constitutional due process, are entitled to at least one declaration and determination of their civil and property rights; and not be shuttled out of a state court, for a claimed lack of jurisdiction due to absence of necessary parties, and then, out of the federal court, on the ground that the state court "determined" all of the issues as to all of the parties, plaintiffs and defendants.

(5) The Issues and the Legal Questions Involved in This Case Are of Great and Far-reaching Importance.

The issues involved herein are of vital importance to large numbers of people and churches throughout the nation. Here, too, are important questions in the administration of justice. In order to settle the important issues and questions presented, and in the interests of justice, this Court, it is respectfully submitted, should review the proceedings below.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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